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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 184.

JOHN C. HAMMOND,

PLAINTIFF IN ERROR,

v.

WILLIAM W. WHITTREDGE, Trustee under the Will of Solon O. Richardson, Deceased, *et al.*

Brief of John C. Hammond, Plaintiff in Error.

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Counsel for JOHN C. HAMMOND,
Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

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WILLIAM W. WHITTREDGE, Trustee under the Will of Solon O. Richardson, Deceased, *et al.*

Brief of John C. Hammond, Plaintiff in Error.

I.

Concise Statement of Case.

The property in dispute consists of a future contingent equitable interest under the will of Solon O. Richardson, who died in 1873.

The plaintiff in error, John C. Hammond, claims the fund under an equitable attachment made in November, 1881, by the Florence Machine Company in a suit against Elbridge L. Sweetser.

The defendants in error, Dowse and Kyle, claim said fund as assignees in bankruptcy of said Sweetser under a bankruptcy assignment dated March 23, 1878.

The value of this equitable interest of the bankrupt Elbridge L. Sweetser in 1878 depended largely upon his

outliving three life beneficiaries, one of whom, as it turned out, lived until December, 1900. During the three years following the bankruptcy the assignees did nothing to show that they claimed this equitable interest. So far as appeared, they had abandoned the same, or were ready to do so. The bankrupt had obtained his discharge before the date of the equitable attachment.

The equitable attachment of the Florence Machine Company was made to secure payment of promissory notes given by Sweetser after the bankruptcy. The assignees in bankruptcy, Dowse and Kyle, knew of the equitable attachment in 1882, but did not intervene for over sixteen years.

The plaintiff in error, John C. Hammond, claims that in November, 1881, the bankrupt Sweetser had such an amount of title that the Florence Machine Company, by its equitable attachment, was able to assert a claim to his equitable interest adverse to that of his assignees in bankruptcy. He claims, further, that the assignees, if they wished to contest the validity of this adverse claim, were bound at their peril to proceed within two years under the provisions of section 5057 of United States Revised Statutes. He claims, further, that, apart from United States Rev. Sts. sec. 5057, the assignees were bound to intervene within a reasonable time in said attachment suit if they wished to dispute the validity of the attachment, and that their delay of over sixteen years was unreasonable.

The defendants in error claim that after the bankruptcy assignment the title of the assignees was so complete that no adverse claim could be asserted by means of an attachment.

The case was reserved for the consideration of the full bench of the Supreme Judicial Court of Massachusetts

upon the pleadings and the agreed facts. The decree complained of was entered in accordance with the opinion and rescript of the full bench.

The errors assigned are nine in number, but the questions really involved are only four:

(1) Did the bankrupt Sweetser, in November, 1881, have such an amount of title in the equitable interest in question that the Florence Machine Company could make an equitable attachment?

(2) Did the attachment made by the Florence Machine Company render it necessary for the assignees at their peril to intervene and contest the same within two years, in accordance with United States Rev. Sts. sec. 5057?

(3) Assuming that the assignees were not bound by section 5057 of United States Revised Statutes to intervene within two years, were they bound to intervene at their peril within a reasonable time?

(4) Was the Florence Machine Company, in November, 1881, barred by United States Rev. Sts. sec. 5057, from bringing its attachment suit?

The decree was against the plaintiff in error on all these points. He claims that it was erroneous.

II.

Specification of Errors relied on.

The plaintiff in error relies upon each of the nine errors specified. There is, however, a certain amount of repetition in the several assignments of error, and a consideration and decision of the four following assignments of error will doubtless be decisive as to the others: —

> "3. It appears by the record that said Hammond is the assignee by mesne assignment of the Florence

Machine Company; that on his voluntary petition, Elbridge L. Sweetser, February 23rd, 1878, was adjudged a bankrupt and that on March 23rd, 1878, his assignees received an assignment executed by the register in usual form; that said Sweetser at the date of his bankruptcy owned an equitable interest vested in right, subject to certain life interests, in a trust fund established by the will of Solon O. Richardson deceased; that in 1881 the assignees of said Sweetser having taken no action as to said equitable interest the Florence Machine Company, a subsequent creditor of said Sweetser by a bill in equity against said Sweetser and the trustees under the will of Solon O. Richardson, undertook to make an equitable attachment of said equitable interest; that the assignees in bankruptcy of Sweetser knew of the bringing of said suit but did not appear to contest it for thirteen years and did not file any answer for eighteen years.

"The said Hammond as assignee of the Florence Machine Company now claims said equitable interest under said equitable attachment. He claimed at the trial of the case and now claims, first, that said Sweetser in 1881 under the true construction of Sections 5044, 5045, and 5046 of United States Revised Statutes still had an equitable interest in said trust fund which could be attached and was attached by said suit of the Florence Machine Company; and second, that the assignees of said Sweetser are barred by Section 5057 of United States Revised Statutes from disputing said attachment, and that accordingly his claim to said equitable interest is superior to that of the assignees of Sweetser.

"Said Supreme Judicial Court by its said final de-

cree has found, first, that according to the true construction of Sections 5044, 5045 and 5046 of the United States Revised Statutes said Sweetser in 1881 had no equitable interest which could be attached by said Florence Machine Company, and second, that the said assignees of Sweetser are not barred by Section 5057 of United States Revised Statutes from disputing said attachment and that accordingly the claim of said assignees in bankruptcy of said Sweetser to said equitable interest is superior to that of said Hammond.

"This the said Hammond claims is contrary to the true construction of said Sections 5044, 5045, 5046 and 5057, and is error."

"5. Said Supreme Judicial Court by its said final decree has found that the ownership of said assignees in bankruptcy drew after it possession and said ownship and possession have continued ever since, and all persons are barred by United States Revised Statutes, Section 5057 from controverting the same.

"This the said Hammond claims is contrary to the true construction of said Section 5057 and is error."

"6. Said Supreme Judicial Court by its said final decree has found that the said assignees in bankruptcy did not abandon said equitable interest and have not been guilty of laches in relation thereto.

"This the said Hammond claims is error."

"7. Said Supreme Judicial Court by its said final decree has found that the said John C. Hammond, assignee of the Florence Machine Company and assignee of the Monitor Oil Stove Company, has no rights in said equitable interest either by reason of the provisions of United States Revised Statutes, Section 5057, or otherwise.

"This the said Hammond claims is contrary to the true construction of said Section 5057 and is error."

III.
Brief of the Argument.
A.
First Question.

The plaintiff in error claims that, according to the true construction of sections 5044, 5045, and 5046 of United States Revised Statutes (being the sections relating to assignments in bankruptcy) the bankrupt Sweetser, in November, 1881, had such an amount of title to the asset in question that the Florence Machine Company could, by making an equitable attachment, render it necessary for the assignees to take proper steps to resist the same.

It is well settled that a bankrupt has a good title to his assets as against all the world except his assignees in bankruptcy.

Under the later English law a bankrupt may maintain an action against a debtor, unless there is interference on the part of the assignees.

In *Clark* v. *Calvert*, 3 J. B. Moore, 96, 112, Lord Chief Justice DALLAS says, —

> "It seems clear that as against all the world except the assignees the bankrupt has a clear right of action. . . ."

In *Herbert* v. *Sayer*, 5 Q.B. 965, 975, TINDAL, C.J., says, —

> "And the question is whether he has a good right to such property against the parties to the bill and all the world except the assignees or no right whatever,

so that he could not sue at all upon the bill. We are of opinion that he has a good right except as against the assignees; and as the plea does not state that they have interfered it does not contain a complete defence."

This case, to be sure, related to after-acquired property, but was under a statute which provided that all present and future assets should pass to the assignees, the language of the statute being the broadest possible.

See also *Semple* v. *London & Birmingham Railway*, 2 Jurist, 296.

Fyson v. *Chambers*, 9 M. & W. 460.

The law in Massachusetts is equally well settled to the same effect.

In *Gay* v. *Kingsley*, 11 Allen, 348, CHAPMAN, J., says, —

"The plaintiff has the title against all persons except the assignee and may enforce it if the assignee does not intervene. . . . He might hold it [the note] as his own if the assignee with knowledge of its existence declined to claim it."

In *Mayhew* v. *Pentecost*, 129 Mass. 332, GRAY, C.J., says, —

"The question whether an action upon a right belonging to the bankrupt at the time of the commencement of the proceedings in bankruptcy can be brought in his name with the consent of the assignee does not appear to have been decided by the Supreme Court of the United States . . . no bankrupt act of the United States has undertaken to prohibit suits upon debts due

> to the bankrupt before the bankruptcy to be brought in the name of the bankrupt with the consent of the assignee, in the courts of those states whose judicial procedure and practice allow suits to be so brought."

As we shall presently show, this assent of the assignee may be given after the suit is brought, and may be inferred from his failure to seasonably object when he learns of the suit.

In *Herring* v. *Downing*, 146 Mass. 10, an insolvent debtor sued on a contract made with the defendant before the insolvency. The insolvent debtor never called the attention of his assignee to the claim, did not insert it in his schedule of assets, and never conversed about the subject with the assignee.

The defendant asked the judge to rule that upon this evidence the action could not be maintained because the right of action had vested in the assignee.

HAMMOND, J., the trial judge, refused so to rule, and instructed the jury, —

> "that the action might be maintained with the assent of the assignee and that it was competent for the jury to find such assent from the assignee's knowledge of the pendency of the suit, his non-interference with it and his attendance at the hearing before the auditor and at the trial in the Superior Court."

Exceptions to this instruction were overruled.

This is a strong authority in favor of the plaintiff in error. The plaintiff was held entitled to maintain the suit by reason of the conduct of the assignee after he learned that the suit had been brought. The assignee had never

heard of the asset until after the insolvent debtor brought suit. Abandonment by the assignee prior to the bringing of the suit was not deemed a prerequisite to the insolvent's right to commence the action.

See also *Fogg* v. *Willcut*, 1 Cush. 300.
Drury v. *Vannevar*, 5 Cush. 442.
Stone v. *Hubbard*, 7 Cush. 597.
Robinson v. *Hall*, 11 Gray, 483.
Norcross v. *Pease*, 5 Allen, 331.
Wonson v. *Pew*, 148 Mass. 299.
Atwood v. *Bailey*, 184 Mass. 133.

The law in Maine is the same.

In *Lancey* v. *Foss*, 88 Me. 215, EMERY, J., says, —

> "Notwithstanding the adjudication and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world except his assignee and creditors."

This was the case of a bankrupt under the act of 1867, United States Rev. Sts., sec. 5046, as in the case at bar.

The asset was not scheduled, but the assignee was presumed to have known of it, and to have elected not to take it.

See also *Sawtelle* v. *Rollins*, 23 Me. 196.
Nash v. *Simpson*, 78 Me. 142, 152.
Fleming v. *Courtenay*, 98 Me. 401, 410.

The federal law is similar.

In *Smith* v. *Gordon*, 6 Law Reporter, 313, 317, Mr. Justice WARE (of United States District Court, Maine) says, —

> "And I take the principle to be a general one that the assignee is not at least ordinarily bound to take into his possession property which will be a burthen instead of a benefit to the estate. If the assignee elects not to take, the property remains in the bankrupt and no one has a right to dispute his possession. His possessory title is good against all the world but his assignee."

In *Amory* v. *Lawrence*, 3 Clifford, 523, 535, CLIFFORD, J., says, —

> "and if he [the assignee] elects not to take the property it remains in the bankrupt and no one certainly, except the assignee, has a right to dispute his possession."

In *Taylor* v. *Irwin*, 20 Fed. Rep. 615, 670, SHIRAS, J., says, —

> "It is for the assignee to determine whether or not in a given case he will assert his right to property. . . . This election he must exercise within a reasonable time. A failure to do so may as against third parties be construed as an election not to claim the property."

In *Glenny* v. *Langdon*, 98 U.S. 20, 31, Mr. Justice CLIFFORD says, —

> "It has long been a recognized principle of the bankrupt law, says Robson, that the assignees of a bankrupt are not in certain cases bound to take property of an onerous or unprofitable character."

In the case at bar the interest of the bankrupt was so contingent as to have no immediate money value and

evidently was unprofitable so far as the creditors of the estate were concerned.

In *Sparhawk* v. *Yerkes*, 142 U.S. 1, 13, Chief Justice FULLER says, —

> "They were not bound however to accept property of an onerous and unprofitable nature which would burden instead of benefiting the estate and they could elect whether they would accept or not after due consideration and within a reasonable time, while if their judgment was unwisely exercised the bankruptcy court was open to the creditors to compel a different conclusion."

See also *Dushane* v. *Beall*, 161 U.S. 513.

In *Sessions* v. *Romadka*, 145 U.S. 29, 51, Mr. Justice BROWN says, —

> "We are of opinion however that this rule does not apply where the assignee before the expiration of the statutory time elects to abandon the property to the bankrupt. In such case abandonment relates back to the commencement of the proceedings in bankruptcy and the title stands as if no assignment had been made. Such abandonment is not so much a transfer of an existing interest in the assignee as an election on his part to treat the assignment as having never included that claim."

It appears from the foregoing cases that where the asset is contingent in its nature and of doubtful value, and the assignees have for a long time omitted to take any action in

regard to it, the bankrupt has such an amount of title that he can make a conveyance or bring a suit concerning it. If the assignees having notice fail to take proper steps to assert their rights they will be barred.

The right of the bankrupt to maintain such a suit may depend upon the action of the assignees after the suit is brought. It is not necessary for the bankrupt to prove that when he brought the action the assignees had already abandoned that particular asset. If the assignees, after the suit is brought, expressly assent to it the bankrupt's title is complete and he will be entitled to recover. If the assignees, after suit is brought, impliedly assent to it, the result is the same.

In the case at bar, three years having elapsed without anything done by the assignees in the way of disposing of this equitable asset, the bankrupt, in November, 1881, had such an amount of title that he could have brought a suit against the trustees under the will to obtain his share, assuming that the contingency had then happened upon which the right to a distribution depended.

By bringing such a suit he would have asserted a claim adverse to that of the assignees and, using the language of Mr. Justice SHIRAS already quoted, it would have been incumbent upon the assignees to take the steps necessary to assert their right to the property.

Mr. Sweetser having such a title it follows that the Florence Machine Company, a subsequent creditor, could make an equitable attachment which would make it incumbent upon the assignees to assert their rights in the proper manner, viz., by an intervention in the attachment suit within two years, in accordance with United States Rev. Sts. sec. 5057.

B.
Second Question.

The attachment made by the Florence Machine Company rendered it necessary for the assignees at their peril to intervene and contest the same within two years in accordance with United States Rev. Sts. sec. 5057.

It appears by the agreed facts (see Record, pp. 34, 35, 39) that the property in question in 1878, at the time of the bankruptcy, consisted of a future contingent equitable interest, the value of which depended largely upon the bankrupt's outliving three life beneficiaries, one of whom, Mrs. Sweetser, as a matter of fact lived until December, 1900. During the three years following the bankruptcy, *i.e.*, from March, 1878, to November, 1881, the assignees did nothing to show that they claimed this equitable interest. So far as appeared, they had abandoned the same, or were ready to do so. In August, 1888, the bankrupt obtained his discharge. In November, 1881, the Florence Machine Company, a subsequent creditor of the bankrupt, made an equitable attachment of this interest by a bill in equity against the bankrupt and the trustee holding the fund. (See Record, p. 35.)

By this attachment the Florence Machine Company asserted a claim to said equitable interest adverse to that of said assignees.

The plaintiff in error, John C. Hammond, claims title under this equitable attachment made by the Florence Machine Company, November 28, 1881. (See amended answer of John C. Hammond, Record, p. 14. See also Agreed Facts, Record, p. 35.)

He claims that the bankrupt in 1881, in spite of the bankruptcy, under the existing circumstances had an attachable interest, and that (the attachment being made,

and the assignees being informed of it) the assignees were bound to intervene within two years, and assert their title.

The said Hammond has pleaded said statute in this suit as a bar to the claims of the assignees. (See Record, pp. 17, 42.)

The language of United States Rev. Sts. sec. 5057, is as follows: —

> "No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee unless brought within two years from the time when the cause of action accrued for or against such assignee."

In regard to the true meaning and effect of section 5057 of United States Revised Statutes there is some conflict of authority.

The cases —

Bailey v. *Glover*, 21 Wall. 342, 346, 347;
Rock v. *Dennett*, 155 Mass. 500;
Pritchard v. *Chandler*, 2 Curtis C.C. 488;
Walker v. *Towner*, 16 N.B.R. 285, 287;
Avery v. *Cleary*, 132 U.S. 604, —

hold that the statute (sec. 5057) applies to adverse claims made by third parties after the bankruptcy, and that assignees are bound to dispute such claims within two years of the time when they are asserted.

In *Rock* v. *Dennett*, 155 Mass. 500, decided in February, 1892, the facts were as follows: One Campbell be-

came bankrupt in 1876, and H. W. Bragg was appointed assignee. The tenant, Dennett, seized possession in 1880 and thereafter held adversely. In 1889 said assignee, never having been in possession of the real estate in question, made an entry and gave a deed to the demandant Rock. The purchaser, said Rock, brought his writ of entry in 1889. *Held*, that the statute (sec. 5057) began to run against the assignee when he was disseized in 1880, and that he was barred after two years. *Held*, also, that the demandant, Rock, who purchased from him, stood in his shoes and was also barred.

The question as to whether the statute applied to adverse claims made against the assets after the bankruptcy or not, was fully argued and considered, and it was decided that the statute did apply to such claims.

Mr. Justice BARKER says, —

> "It is contended that the limitation contained in U.S. Rev. Sts. § 5057, does not under such a state of facts bar the demandant's action because as it is claimed that limitation applies only to suits in respect of property to which adverse claims existed while it was in the hands of the bankrupt and before assignment, and does not apply to wrongs done to the assignee or to property of the estate after it has vested in him. . . . But the statute has a wider operation than that for which the demandant contends. As is said by MILLER, J., in *Bailey* v. *Glover*, 21 Wall. 342, 346, 347, 'it applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued

for or against the assignees. . . . Congress has said to the assignee you shall commence no suit two years after the cause of action has accrued to you.'

"The narrower view of the corresponding provisions of the Bankruptcy Act of 1841 . . . taken by Mr. Justice NELSON in *In re Conant*, 5 Blatch. 54, and followed in *Stevens* v. *Hauser*, 39 N.Y. 302, is inconsistent with the views of Mr. Justice CURTIS in *Pritchard* v. *Chandler*, 2 Curtis C.C. 488, and contrary to the plain implication of the decision of the Supreme Court of the United States in *Banks* v. *Ogden*, 2 Wall. 57, 70. The explicit and comprehensive statement of the construction of the limitations given in *Bailey* v. *Glover*, *ubi supra*, is plainly inconsistent with the contention of the demandant and with the doctrine of the cases on which he relies. It is said in *Traer* v. *Clews*, 115 U.S. 528, 538, that the case of *Bailey* v. *Glover* has never been overruled, doubted or modified by the Supreme Court of the United States. It is undoubtedly the authoritative exposition of the law and conclusive upon the point that the short statute of limitations applies to adverse claims arising after the assignment in respect to property vested in the assignee. See also the opinion of DILLON, J., in *Walker* v. *Towner*, 16 N.B.R. 285, 287, and cases cited. It follows that the statute is a bar to the demandant's action."

In 1896 this Court, in the case of *Dushane* v. *Beall*, 161 U.S. 513, without in any way referring to *Rock* v. *Dennett*, or *Bailey* v. *Glover*, or *Pritchard* v. *Chandler*, or *Walker* v. *Towner*, or *Avery* v. *Cleary*, made a dictum as follows: —

"That limitation (sec. 5057) is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee to which adverse claims existed while in the hands of the bankrupt and before assignment."

The only case cited for this which is at all in point is *In re Conant*, 5 Blatch. 54, which, as Mr. Justice BARKER pointed out, was under the act of 1841, the language of which was essentially different.

We believe that the law is as stated in *Bailey* v. *Glover* and *Rock* v. *Dennett*, and that those cases cannot be considered as overruled.

An examination of the briefs in said case of *Dushane* v. *Beall* shows that the case of *Rock* v. *Dennett* was not cited nor called to the attention of the Court.

The adverse claim in *Dushane* v. *Beall*, as in the present case, consisted of an attachment of an asset which formed a part of an estate in bankruptcy. The facts were as follows: In 1876 one Tintsman was adjudicated a bankrupt. He had a possible claim against a railroad company, but did not include it in his schedules. After his bankruptcy he became indebted to one Beall, who, in 1888, attached said claim as the property of the bankrupt. The assignee in bankruptcy appeared in 1888 to contest this attachment. The attachment proceeding was brought in the Court of Common Pleas in Pennsylvania, and that Court ruled that the assignee had lost any right to the fund by reason of delaying claim thereto for an unreasonable time, and also that the assignee was barred by section

5057. The case was then taken to the Supreme Court of Pennsylvania (149 Penn. St. 439), which ruled that the statute, sec. 5057, did not apply, but that the delay of the assignee was fatal to his claim.

The assignee in bankruptcy took the case to this Court. Chief Justice FULLER, in his opinion, says, —

> "Nor can we find . . . any evidence that the assignee knew or was informed of [the bankrupt] Tintsman's interest prior to August 10, 1888."

It is clear that the rights of the assignee were not barred by section 5057. The adverse claim of the attaching creditor was not asserted until 1888, and in the same year the assignee intervened to contest his claim. From the bankruptcy in 1876 down to 1888, the only person claiming an interest adverse to the assignee was the bankrupt himself. It is well settled that the statute, sec. 5057, does not run in favor of the bankrupt against the assignee.

If in *Dushane* v. *Beall* the assignees had delayed for sixteen years to intervene, the decision would doubtless have been different.

Here the adverse claimant is not the bankrupt, but the Florence Machine Company, a subsequent creditor which has, by means of its attachment suit, charged the asset in question with an equitable lien in its favor.

See *Snyder* v. *Smith*, 185 Mass. 58.

In the case at bar the assignees knew of the attachment suit in 1882, within one year after it was brought. Warren O. Kyle, who was appointed one of the assignees of Sweetser in December, 1882 (see Record, p. 36), was solicitor for the Florence Machine Company in the attach-

ment suit brought in November, 1881 (see Agreed Facts, Record, p. 35), and was acting as such as late as November, 1882, when he signed the replication filed November 15, 1882. (See Record, p. 26.)

It is interesting to note that Mr. Warren O. Kyle, as assignee and one of the defendants in error in this case, now claims that no rights were obtained by the suit brought by him in 1881.

The plaintiff in error claims that the assignees were bound at their peril to file an intervening petition, or an answer in the nature of such a petition, in said attachment suit within two years of the time they learned of its existence.

In *Snyder* v. *Smith*, 185 Mass. 58, it was held that an intervening petition was a proper method of testing the validity of an equitable attachment.

The same result possibly could have been attained by a bill in equity against the Florence Machine Company to enjoin it from proceeding with its attachment suit.

The assignees did not bring such a bill, nor did they within two years seek to intervene.

The statute of limitations, section 5057, began to run against the assignees in December, 1882, and in December, 1884, became a bar against them.

It is not necessary to determine whether the two years began to run against the assignees as soon as the attachment was made in November, 1881, on the ground that it was openly brought, and there was no fraudulent concealment of the same.

It certainly began to run in December, 1882, when Mr. Kyle became a co-assignee with Mr. Dowse in place of Mr. Dibble. (See Record, p. 36.) Reckoning from

either date, more than two years elapsed before the assignees intervened to contest the adverse attachment of the Florence Machine Company.

The plaintiff in error claims that, according to the weight of authority, whenever, after the bankruptcy assignment, adverse claims are properly asserted against the assets, either by attachment or adverse possession, or otherwise, the assignees are bound, under section 5057, to proceed in court against the adverse claimant within two years, to maintain their rights.

The assignees, having failed to proceed in court in the proper way against the Florence Machine Company within two years, should be held to be barred.

C.
Third Question.

Assuming that the assignees were not bound by section 5057 of United States Revised Statutes to intervene within two years, they nevertheless were bound to intervene at their peril within a reasonable time.

They did not intervene for over sixteen years (see Record, p. 39), when on May 20, 1899, they filed an answer setting up their title as assignees.

In *Squire* v. *Lincoln*, 137 Mass. 399, 405, FIELD, J., says, —

> "We are of opinion that if the assignee having notice of the suit does not intervene it is not open to these defendants to set up this defence; it is presumed then that the assignee assents to the plaintiffs prosecuting the suit."

In the case at bar the assignees knew of the suit, and did not intervene for over sixteen years.

The said Hammond duly raised the point that said intervention was too late. (See Hammond's Amended Answer, Record, p. 17. See Agreed Facts, Record, p. 42.)

In *Taylor* v. *Irwin*, 20 Fed. Rep. 615, 620, SHIRAS, J., says, —

> "It is for the assignee to determine whether or not in a given case he will assert his right to property. . . . This election he must exercise within a reasonable time. A failure to do so may as against third parties be construed as an election not to claim the property. . . . In January, 1883, when the attention of the assignee was directly called to the property he did not take the steps necessary to assert his right to the property. . . . Under these circumstances the assignee should now be estopped from asserting any right or title to the property against the defendant."

In the case at bar the situation from 1878 to 1882, inclusive, was as follows: At the time of the bankruptcy the bankrupt Sweetser had a vested future interest, which, for various reasons, was of doubtful present value. His assignees in bankruptcy had a right to elect whether they would abandon this asset or not. No right of action had accrued, either in favor of the bankrupt or his assignees, against the trustee under the will, as the entire income of the trust fund was payable to the life beneficiaries, and no part of the principal was payable to the bankrupt until the termination of the trust upon the decease of the last of said life beneficiaries.

No statute of limitations was, therefore, running in favor of the trustee, under the will, against either the bankrupt or his assignees. This situation continued for nearly four

years, when the Florence Machine Company made its equitable attachment. November 28, 1881. (See Record, p. 32.)

The only way the assignees could properly realize anything from the asset was by selling the same. It was not to be supposed that the assignees would think of waiting until the termination of the trust to close their estate. It is the duty of assignees to collect all claims and dispose of all assets which are of value within a reasonable time, and two years is ordinarily held to be a reasonable time.

If an assignee omits to bring suit within two years on any claims which are matured, his right of action is barred.

Ross v. *Wilcox*, 134 Mass. 21.

After the expiration of two years from the date of Sweetser's bankruptcy, it was reasonable for the bankrupt and his subsequent creditors to assume that the assignees had abandoned this asset. No sale had been made, and no notice had been given to the bankrupt or to the trustee under the will, that the assignees intended to do anything with the asset. The interest of Sweetser under the will appeared of record in the probate court.

There was no fraudulent concealment of the asset by the bankrupt. No examination was made of the bankrupt. He was allowed to obtain his discharge.

To use the language of Chief Justice FULLER in *Sparhawk* v. *Yerkes*, 142 U.S. 1, 14, the assignees "contented themselves with the hope that masterly inactivity might enable them to assert a claim if the asset finally proved of value."

The language of Mr. Justice SHIRAS, in *Taylor* v.

Irwin, 20 Fed. Rep. 615, 618, is very much in point. He says, —

> "The title to the land stood in the name of Joseph Cain [the bankrupt] upon the records of the county in which it is situated for more than four years after the assignee was appointed. It does not appear that the assignee ever examined the bankrupt touching his property, or that either the bankrupt or his wife ever made any false statement to the assignee about the property. While the assignee may not have known that the property could be subjected to the debts due creditors yet it does not appear that the bankrupt or his wife took any steps to conceal the property or deceive the assignee in regard to the same. Certainly nothing is proven affecting the good faith of the defendant (a purchaser from the bankrupt). . . . In January 1883 . . . at the request of a creditor he (the assignee) did put up for sale whatever interest he might have in the property. . . . It was then occupied by an adverse claimant and it was his duty if he wished to sell it to procure an order from court for that purpose after notice given to the adverse party. . . . Under these circumstances he would not only be barred by the statute of limitations but would also be estopped from asserting a right to the premises against a *bona fide* purchaser for value."

In November, 1881, the Florence Machine Company had a right to assume that this asset had been abandoned. The bankrupt had an equitable interest which could be attached.

The Florence Machine Company attached it. The suit, by means of which the attachment was made, was a

matter of record. The bankrupt and the trustee under the will were both made parties defendant and both were served with process. There was no occasion to join the assignees as parties.

It has never been suggested that a bankrupt bringing suit upon an abandoned chose in action should join the assignee as a party, either as a plaintiff or a defendant. The Florence Machine Company brought its suit in the usual way.

The defendant Hammond claims that the making of this equitable attachment was an assertion by the Florence Machine Company of an adverse interest touching this asset, and that the assignees were bound at their peril to defend their title either by intervening in said suit within a reasonable time (*Squire* v. *Lincoln*, 137 Mass. 399, 405; *Powers* v. *Raymond*, 137 Mass. 483) or by bringing a separate suit against the Florence Machine Company to enjoin them from proceeding with said attachment.

As suggested by Mr. Justice SHIRAS, they could not make a proper sale except after obtaining an order of court granted after notice to the Florence Machine Company.

They did not attempt to make any sale.

They did not intervene until after eighteen years had elapsed. They did not bring any suit against the Florence Machine Company to enjoin said attachment.

The case of —

Avery v. *Cleary*, 132 U.S. 604, —

is a strong authority for the defendant Hammond. The facts were as follows: The bankrupt Ellis, having three policies of life insurance, assigned them about a year before his bankruptcy to one Morse as trustee for his two

children. About a year after the bankruptcy (which was in 1878) the insurance company was notified of the assignment. A little later the bankrupt died, and his administrator, being also the guardian of said children, collected over $10,000 from the company. About three years later the assignee in bankruptcy learned of the matter and sued the administrator and guardian to recover the amounts collected. *Held*, that the notice to the insurance company made on behalf of the children after the bankruptcy was the assertion of a right adverse to that of the assignee, and that the statute (sec. 5057) began to run from that date against the assignee in favor of the children, and the trustee and administrator and guardian who acted for them. *Held*, also, that the failure of the bankrupt to include the policies in his schedules and to inform the assignee of their existence did not amount to a fraudulent concealment of the policies so as to prevent the statute running even though the assignee was ignorant of the cause of action against said children and those acting for them. *Held*, also, that the suit by the assignee against the person acting for the children was a suit between an assignee and a person claiming an adverse interest within the meaning of section 5057, and was barred by the statute.

The following language of Mr. Justice HARLAN is pertinent: —

> "the mere fact that he [the bankrupt] omitted any mention of the policies in his schedules in bankruptcy and that neither he nor his administrator gave information of them to the assignee would not establish fraud within the meaning of the rule announced in *Bailey* v. *Glover*.
>
> "The omission from the schedules of any reference to the policies and the failure to call the attention of

the assignee to them may have been caused by an honest belief upon the part of Ellis that they belonged to his children. . . . Be this as it may the bankrupt's children are to be regarded as asserting an interest in the policies at least from March 1, 1879. . . . Fraud is not imputable to them nor to the guardian simply because neither they nor he informed the assignee in bankruptcy of their claims. Their silence when they were not under any legal obligation to speak, and when they were unaware of any claim being asserted by the assignee did not amount to concealment. They did nothing to prevent him from obtaining full information in reference to the assets of the bankrupt. . . . It is fundamental in the rule announced in *Bailey* v. *Glover* that there must not be negligence or laches upon the part of the assignee in bankruptcy in coming to the knowledge of the fraud which is the foundation of his suit and which is relied upon to defeat the limitation of two years. A rigid enforcement of that condition is essential to meet the object of the statute of limitation. That object was to secure a prompt determination of all questions arising in bankruptcy proceedings and a speedy distribution of the assets of bankrupts among their creditors . . . the assignee did not show such diligence as entitles him to exemption from the limitation of two years prescribed by the statute."

Cleary v. *Ellis Foundry Co.*, 132 U.S. 612, —

is to the same effect.

Apart from any statute of limitations, a court of equity will hold failure to act for seventeen years laches.

In *Taylor* v. *Irwin*, 20 Fed. Rep. 615, the assignee, after six years, was held to be barred not only by the statute, but also by laches.

A delay of six or seven years is often held laches.

No authorities need be cited for the proposition that a delay of seventeen years will amount to laches.

D.
Reply to Defendants' Claim.

The assignees Dowse and Kyle, defendants in error, will doubtless claim that their rights were preserved by the suit of *Dibble* v. *Sweetser*, brought by Mr. Dowse in his own name and that of Mr. Dibble in the United States District Court, September 19, 1882, against the bankrupt Sweetser and the trustee Solon O. Richardson. (See Record, p. 36.)

It is a complete answer to this to say that the Florence Machine Company was not made a party to this suit, and, so far as appears, never heard of it until twenty years later.

Still further, the assignees Dowse and Kyle have not, in their answer filed in this case, claimed any rights by reason of the said suit of *Dibble* v. *Sweetser*. As the case was reserved for the consideration of the full court upon the pleadings as well as the agreed facts, it was not, and is not, open to the said assignees to base any rights upon the fact that such a suit was brought.

Mr. Hammond claims that this suit was entirely inoperative against the Florence Machine Company. Said company was not joined as a party, and it does not appear that it ever knew of the suit. No cause of action had accrued in favor of the assignees as against Solon O.

Richardson, trustee, and the only apparent reason for bringing the suit was that the assignees, or rather Mr. Dowse, felt that the title of the assignees to said asset was uncertain. The bill prayed that the said Sweetser might be ordered to assign his interest to the assignees, and that the trustee might be enjoined from paying the trust fund to the said Sweetser or any one claiming under him. It did not pray that the bankrupt might be enjoined from making any transfer and did not refer in any way to the attachment suit of the Florence Machine Company.

It does not appear that Mr. Dibble knew of the suit, or authorized the use of his name. The fact that he had already filed his resignation as assignee would indicate, perhaps, that he did not consent to the use of his name.

Assuming that the suit was properly authorized by Mr. Dibble, and that it was properly brought in his name after his resignation (which is not conceded), the only possible ground upon which the suit could be maintained was the obtaining of a decree enjoining the bankrupt from selling or transferring his interest. The assignee Dowse evidently felt that the conduct of the assignees had been such that the bankrupt might consider that they had abandoned this asset, and considered that there was danger of his attempting to dispose of it.

It does not appear that Mr. Kyle, who became one of the assignees in December, 1882, after this suit of *Dibble* v. *Sweetser* was brought, ever knew of it until long afterwards. He did not become a party to the suit for many years.

The defendants in error will also rely upon the fact that the assignees did not have actual knowledge of this asset until after the adverse interest was asserted.

The same thing was true in —

Lancey v. *Foss*, 88 Me. 215.
Taylor v. *Irwin*, 20 Fed. Rep. 615.
Avery v. *Cleary*, 132 U.S. 604.
Herring v. *Downing*, 146 Mass. 14.

In these cases the Court place great stress upon the point that the ignorance of the assignees was due to their failure to inquire.

No fraudulent concealment of the asset by the bankrupt is shown.

If the bankrupt had been examined, or the records of the probate court searched, the assignees would have learned of this equitable interest prior to 1881. When they did learn of it in 1882, and when they knew that the Florence Machine Company was seeking by its attachment to reach and apply it, they omitted to intervene, and, so far as appears never informed the Florence Machine Company that its adverse claim would be resisted.

See also, on the question of laches and estoppel, —

Hallett v. *Fowler*, 10 Allen, 36.
Fleming v. *Courtenay*, 98 Me. 401, 410.
Nash v. *Simpson*, 78 Me. 142, 152.
Amory v. *Lawrence*, 3 Clifford, 523, 535.
Sessions v. *Romadka*, 145 U.S. 29, 39.

E.
Fourth Question.

The Florence Machine Company in November, 1881, was not barred by United States Rev. Sts. sec. 5057, from bringing its attachment suit.

The suit was not brought against the assignees. It was brought against the bankrupt and the trustee under the will of Solon O. Richardson. The plaintiff proceeded

upon the theory that the bankrupt had such title to the asset in question that the plaintiff could make an equitable attachment.

Section 5057 applies only as regards suits or proceedings in court brought by or against assignees in bankruptcy.

In —

Rock v. *Dennett*, 155 Mass. 500, —

a claim adverse to that of the assignee was asserted by Mr. Dennett by a seizure of property which formed a part of the estate in bankruptcy.

In —

Avery v. *Cleary*, 132 U.S. 604, —

a claim adverse to that of the assignees was asserted by the children of the bankrupt by a notice to the insurance company that they claimed under an assignment from the bankrupt.

In the case at bar, the adverse claim was asserted by the Florence Machine Company by means of an attachment suit which, in a way, amounted to a seizure of the property.

The assignees have not pleaded the statute (sec. 5057) as a bar to the attachment suit, and for this reason, also, it was error for the Court to find that the Florence Machine Company was barred by that statute.

F.

Motion to Dismiss.

The points raised by the defendants in error in their motion to dismiss have been discussed in the brief filed by the plaintiff in error October 20, 1906. He begs leave

to refer to that brief for a consideration of the questions there raised.

In —

Dushane v. *Beall*, 161 U.S. 513, —

the point was raised that no federal question was involved, but the objection was summarily disposed of.

C.

Conclusion.

The plaintiff in error is constrained by considerations of expense to forego an oral argument of the questions involved in this case.

He respectfully submits that the questions raised are interesting and important, and worthy of the careful consideration of the Court.

HOLLIS R. BAILEY,
for JOHN C. HAMMOND,
Plaintiff in Error.